In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6041

J. S. CVITKOVIC and MARTIN BOSKOVICH, NIKOLA JANDRILOVICH and MARTIN BOSKOYCEH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

BRIEF OF APPELLEE

ANTHONY SAVAGE,
United States Attorney,

CAMERON SHERWOOD,
Assistant United States Attorney

HAMLET P. DODD,
Assistant United States Attorney,

Attorneys for Appellee.

Post Office and Office Address:
310 Federal Building, Seattle, Washington.

FILED
MAY 27 19..
PAUL P. O'BRIEN,
CLERK

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6041

J. S. CVITKOVIC and MARTIN BOSKOVICH, NIKOLA JANDRILOVICH and MARTIN BOSKOYCEH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellants, with others, were charged by indictment with conspiracy to violate the National Prohibition Act and with violation of Sections 3281 and

3282 of Revised Statutes. Three counts are set forth in the indictment.

The conspiracy count alleges that defendants conspired together to manufacture and to possess intoxicating liquor. Overt acts supporting this count allege: That appellant Cvitkovic and one Petrovich, his father-in-law, purchased land in King County, Washington, known as the West Place, about July 20, 1928; that appellant Martin Boskovich about March 12, 1929, manufactured 100 gallons of whiskey at the West Place; that about the same date appellants Cvitkovic and Boskivich possessed 100 gallons of whiskey; that about March 7, 1929, appellants Cvitkovic and Boskovich possessed a complete still of 450 gallons capacity, at the West place; that about the same date appellant fermented 4000 gallons of mash fit for distillation purposes; that about the same date appellants possessed 12 mash vats, one 500-gallon cooling vat, 15 10-gallon barrels, 2 pressure tanks, 4 burners and 30 gallons of kerosene; that about March 12, 1929, appellants possessed 1000 gallons of mash fit for distillation purposes; that about the same date appellants possessed about ninety gallons of wine; that about the same date appellants went to the West Place; that on or about the same date appellants

maintained and conducted a nuisance at the West Place.

In the second count appellants are charged with conducting the business of a distiller of spirits without having given bond.

In the third count appellants are charged with making mash fit for distillation of spirits at a place other than an authorized distillery (Tr. 129).

The trial resulted in a verdict of guilty as charged, each of the defendants being convicted on three counts of the indictment. Defendant Stabljak was acquitted (Tr. 12 and 13). Defendant Petrovich was not apprehended prior to trial.

Judgment and sentence pronounced directs that appellant Cvitkovic serve eighteen months at hard labor in the Federal Penitentiary and that he pay a fine of $1500 and costs on the three counts of the indictment taken together; that appellants Boskovich, Jandrilovich and Boskoyceh serve thirteen months each in the Federal Penitentiary at hard labor, and that each pay a fine of $1,000, all three counts being taken together (Tr. 13, 17).

At trial evidence was adduced substantially as follows:

Government agents on March 7, 1929, discovered a large still and complete equipment for the manufacture of liquor in a dugout at the West Place in King County, Washington. The still was warm; 100 gallons of moonshine whiskey was found at the still. On the following morning agents saw appellant Boskovich come out of the house on the West Place and go up to the still, removing evergreen trees used as a screen (Tr. 20). Boskovich went to and from the still several times during that day, at times carrying something to the garage. Sounds of moving kegs were heard from the garage on these occasions. On the evening of March 11th a large touring car drove in from the Cedar Mountain direction (Tr. 21). The car passed agents stationed along the road.

It was shown that a pipe drained refuse from the still into a cesspool 300 or 400 feet south of the still on the West Place. In an old house on the place 90 gallons of wine was found (Tr. 24).

On March 8 an agent saw a Studebaker automobile, license No. 156-956, which appeared to be heavily loaded, going towards Seattle from the direction of

the still. He followed this car to the Blue Ribbon Garage in Seattle (Tr. 26). This same automobile was twice seen in the garage at the site of the still. It smelled of whiskey (Tr. 34, 42 and 47).

Appellant Boskovich admitted to the agents that he had driven that Studebaker to the Seattle Garage loaded with whiskey on the morning the agent had followed the car (Tr. 45, 78). This same Studebaker automobile was found the day after the raid at the home of appellant Jandrilovich (Tr. 55, 41, 44, 47). It smelled of liquor (Tr. 44). The Studebaker car was repaired in the Blue Ribbon Garage in Seattle where the appellant Cvitkovic kept other cars. Repair accounts on the cars were kept in the name of "Joe S.", and paid by the appellant J. S. Cvitkovic (Tr. 61 and 62). One of the garage men had seen appellant Boskoyceh driving a Studebaker automobile into the garage for repairs (Tr. 55). Appellants Jandrilovich, Cvitkovic and Boskovich were also patrons of this garage (Tr. 56, 64). (See also Govt's. Ex. No. 24.) It is the natural inference from this testimony that the appellants had direct association together in their illegal operations involving the Studebaker automobile, License No. 156-956, when taken in connection

with all of the other facts shown at time of trial.

In brief, the record shows that the Studebaker automobile was one listed under the account carried at the Blue Ribbon Garage by appellant Cvitkovic under the designation "Joe S.", one of said appellant's aliases being Joe Sweet (Tr. 61, 37). Repair bills paid by appellant Cvitkovic were from $50 to $100 per month (Tr. 61). Appellant Boskovich admitted that he used the car to haul liquor from the still to the Blue Ribbon Garage.

Witness Dietz testified that appellant Boskoyceh drove the Studebaker to the garage for repairs (Tr. 55). Cvitkovic paid the repairs on this car (Tr. 62).

In the face of the testimony of appellants that they had not known each other prior to the raid on March 12th (Tr. 80, 83, 78), the evidence is strongly persuasive of their confederation for the purpose of violating the law as charged.

A further circumstance shown by the testimony was alone sufficient to present a question of substance to the jury. Appellant Cvitkovic was at the time of his arrest driving a Ford Sedan, Motor No. A-496900, belonging to appellant Jandrilovich (Tr. 41). This was admitted by Jandrilovich (Tr. 92).

Government's Exhibit No. 3, being the application of Jandrilovich for a license on said Ford Sedan, was found in the pocket of the car at the time Cvitkovic was arrested near the still location (Tr. 38, 41, 47). Cvitkovic was seen to drive the same car up to the still location immediately prior to the raid, and Jandrilovich and Boskoyceh alighted from the car (Tr. 38-44). Tire marks in the road where Cvitkovic allowed Jandrilovich and Boskoyceh to alight at the still were identical with the treads on the Ford Sedan Cvitkovic was driving at the time of his arrest (Tr. 41).

Cvitkovic testified he borrowed Jandrilovich's car from an associate of Jandrilovich (Tr. 80, 81). The said associate of Jandrilovich was not produced as a witness by appellants, nor his absence explained. Subsequent to the arrests Jandrilovich assigned the contract on the Ford Sedan (Tr. 65).

Neighbors of Jandrilovich testified that Cvitkovic and Boskoyceh had visited Jandrilovich at his home prior to the raid (Tr. 52, 49).

Cvitkovic and Boskoyceh both made payments at the bank on the contract for purchase of the West Farm by Cvitkovic and defendant Petrovich (Tr. 59).

The garage proprietor testified as follows:

> "I believe it was the drivers, and not Joe Cvitkovic that ordered the licenses on those cars. Martin Boskoyceh was one of the drivers" (Tr. 64).

All of the appellants made singularly conflicting, false and evasive statements at the time of their arrest, some giving false names. They gave no satisfactory explanation of their presence at the still location with the exception of Boskovich (Tr. 22, 23, 24, 28, 29, 30, 31, 32, 37, 39, 40, 44, 45, 46, 47, 48).

The appellants had difficulty in showing that they were possessed of means of earning a legitimate livelihood.

Testimony showed that after the agents had discovered Boskovich in the act of dismantling the still on the early morning of March 12th, an agent resorted to the ruse of calling Cvitkovic at his home by telephone and informing him that "his still was being raided." Cvitkovic made incriminating statements at this time (Tr. 27, 28). The telephone call was at 6:30 A. M. Cvitkovic was out at the still soon thereafter (Tr. 36, 37, 38, 44), accompanied by Jandrilovich and Boskoyceh.

The agent obtained Cvitkovic's telephone number (which was unlisted in the telephone directory) by calling Boskoyceh by telephone (Tr. 27). This circumstance alone shows by inference a connection between Cvitkovic and Boskoyceh, denied by them at trial.

Cvitkovic when told by the agent over the telephone that his still had been located and was to be raided (Tr. 27) said:

"Located my still? Which one?"

When he was told by the agent "the one in Maple Valley," he uttered an oath and slammed the receiver (Tr. 28).

The story of Jandrilovich that he had met Boskoyceh for the first time on the road the morning of the raid and had come to the West Place for something to eat (Tr. 29) is refuted by the testimony hereinabove referred to showing that Cvitkovic let them out of Jandrilovich's car at the still. Jandrilovich hid behind a tree at the time of his arrest. He denied he was in Cvitkovic's car, but admitted having seen it (Tr. 30). This is unreasonable, particularly as it was Jandrilovich's own car which he claimed had passed them on the road.

The record is replete with strong circumstances showing the guilty knowledge and participation of all of the appellants in the unlawful conspiracy and in the operation of the still at the West Place.

ARGUMENT

A substantial question of fact was presented to the jury as to the guilt of each of these appellants. The jury heard the evidence, saw the witnesses, and were the sole judges of their credibility. The evidence was legally sufficient to sustain a conviction of the appellants herein.

> "If an inference of guilt may be fairly drawn the evidence meets the test of legal sufficiency."
>
> *Anstess vs. U. S.,* 22 Fed. (2d) 594, 595;
> *U. S. vs. Green,* 220 Fed. 973-975;
> *Robilio vs. U. S.,* 259 Fed. 102;
> *Jelke vs. U. S.,* 255 Fed. 264, 280;
> *Applebaum vs. U. S.,* 274 Fed. 43, 46.

Conspiracy may be proved solely by circumstantial evidence. *U. S. vs. Wilson,* 23 Fed. (2d) 113 and 117.

The motion for directed verdict made at the close of the Government's evidence in chief, and renewed at the close of the entire case, was correctly overruled in each instance.

Appellants complain that the evidence introduced, while sufficient to direct suspicion toward one or more of the appellants, was as compatible with innocence as with guilt, and failed to establish the existence of a conspiracy between the appellants. They cite *Benn vs. U. S.,* 21 Fed. (2d) 262, as supporting their theory.

In the case of *Benn vs. U. S.* there was no showing by evidence that the defendant was ever seen at the still location, and the defendant's own testimony showed that he had only been out there on a few widely separated occasions. Therefore, there was no proof that Benn had the opportunity to take part in the unlawful acts charged in that case, nor was it proved that the still was operated by agents. That is not the case here presented.

Lempie vs. U. S. (9th Circuit), a case recently de-

cided by this court, is also relied upon. This case did not charge conspiracy and can also be distinguished from the present case on the facts. The only evidence tending to connect defendant Lempi with the still was that he owned a five-acre tract of land and that a still was found 1700 yards from the house on this tract; that the still was approached by trails leading to the house, and that the still was connected with a three-year-old pipe line system which ran under the property of the defendant. Clearly, this case is distinguished from the *Lempi* case on the facts.

In the case of *Harlivy vs. U. S.*, 13 Fed. (2d) 114, another case relied upon by appellants to sustain this contention, there was no showing that the defendant had any knowledge of the still. In the present case, each of the appellants clearly had knowledge of the still as indicated particularly by the hurried trip of three of them to the still on the morning of the raid.

The other cases cited on this point by appellant are also distinguished on the facts, although admittedly correct.

In the case of *Perry vs. U. S.*, 18 Fed. (2d) 477, cited to uphold this contention, the defendant Perry

was the owner of certain rural property, a part of which was leased to co-defendants. There was no proof that Perry had any knowledge that a still was being operated on these premises as in the present case. In the *Perry* case there was evidence that the tract of land was leased for a grist mill and store; whereas, in this case there was no showing that the West property belonging to Cvitkovic was even tillable or otherwise valuable for legitimate use. Certainly no effort was made by appellants to so use the property.

The jury did not have to rely upon mere guesswork and speculation to reach their verdict in this case as they would necessarily have in the cases cited by appellants in their brief.

The evidence reasonably bears out the inference, and the jury must have so found, that Cvitkovic purchased the West property with a view to using same for the unlawful purpose proved, and that the other appellants were his associates in the unlawful venture. This theory of the case is clearly borne out by the course of conduct of appellants immediately prior to their apprehension. Upon receipt of the telephone call informing him that his still was being raided Cvitkovic

gathered to him his co-conspirators, Boskoyceh and Jandrilovich, and rushed them out to the still location. This circumstance is certainly more compatible with the guilt of appellants than with their innocence, and shows intent on their part to perpetuate the unlawful business rather than to abandon it.

The government admits the theory of law advanced by appellant Cvitkovic that even though he knew his tenant Bojeceh was operating a still on the demised premises, such knowledge would be insufficient to convict him, but the evidence against Cvitkovic goes far enough to show active participation in the unlawful business by Cvitkovic, and therefore the cases cited on this point by appellants are of no force here.

In the case of *Di Bonaventura vs. U. S.,* 15 Fed. (2d) 494, and the case of *Perry vs. U. S., supra; Fisher vs. U. S.,* 13 Fed. (2d) 756, and *Reynolds vs. U. S.,* 282 Fed. 256, no proof was adduced tending to show an unlawful agreement between the appellants therein and co-defendants.

In the *Di Bonaventura* case the still was located on the third floor of a building owned by Di Bonaventura, and no evidence was produced tending to

show that the owner of the building knew an unlawful business was being conducted in his building.

In the *Fisher* case Fisher agreed to haul packages for co-defendants which contained liquor, but there was no proof that he knew what the packages contained, or that he had expected any pecuniary reward for his part in the transaction.

The instructions in the present case are sustained by the case of *U. S. vs. Kissel,* 218 U. S. 601, 607, 608, where the Supreme Court used the following language:

> "A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement rather than the agreement itself, as a partnership, although constituted by a contract, is not the contract but is the result of it. The contract is instantaneous; the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes."

This definition of conspiracy is clearly borne out by the instructions given by the trial court in this case (Tr. 108, 109, 110).

There is no force to appellant's contention that the conspiracy to manufacture and possess intoxicating liquor and to maintain a common nuisance ended at the time the officers arrived at the still location on

March 12th, as clearly the acts of appellants at the time they arrived and immediately thereafter indicated that the conspiracy was still in existence. The overt acts of appellants proved, clearly were in furtherance of the conspiracy, and therefore the cases cited by appellants on page 28 of their brief are not in point.

It is denied that Cvitkovic ever received the telephone message from the Prohibition Agent on the morning of the raid. However, the fact of the telephone conversation is logically corroborated by the acts of the appellants immediately after the conversation.

Counsel cite *U. S. vs. Austin Co.*, 31 Fed. (2d) 229; *Fader vs. U. S.*, 257 Fed. 694; *Browne vs. U. S.*, 145 Fed. 1, *Bortkus vs. U. S.*, 21 Fed. (2d) 425, to sustain the proposition that conviction of only one defendant cannot be sustained if all other alleged conspirators are acquitted or dismissed. However, the indictment in this case alleges that the appellants, and each of them, conspired "with each other and with sundry and divers other persons to the grand jurors unknown." (Tr. 3) and therefore a conviction must be sustained as to any and all defendants in this case.

Grove vs. United States, 3 Fed. (2nd) 965.

The case of *U. S. vs. Browne, supra,* cited in support of this contention, at page 13 of the opinion, supports the theory of the government as to this contention. In that case error was assigned as to the refusal of the court to grant a new trial to one co-defendant and at the same time granting it to a second co-defendant. The appellate court in upholding the ruling of the trial court said:

> "The evidence certainly warranted a verdict that Browne conspired with one or more persons, unnamed or unknown, who were to prepare false invoices, to defraud the United States."

Another assignment of error made by appellants, to the effect that conviction of Boskovich cannot be sustained as to the second and third counts of the indictment, it being the contention that only one holding a proprietary interest in the operation of a distillery can be guilty of those charges. This contention is refuted in the case of *Vukich vs. U. S.,* 28 Fed. (2d) 666. In that case the defendant was charged with violations of Sections 3281 and 3282 of the Revised Statutes. The Court in instructing the jury charged them as follows:

> "On the other hand, if there were others than the defendant engaged in operating that distillery,

> and this defendant knew they were so engaged in operating it and aided and assisted them in its operation with the intent and for the purpose of carrying their activities to success, then and under such circumstances he would be a principal, and would, within the meaning of this act be engaged in carrying on the business of a distiller, by reason of the law which says that whoever does the acts necessary to constitute a crime, or who aids or abets another in their commission, is a principal."

The Court in its decision at page 669 of the opinion held:

> "It follows that one who knowingly delivers supplies to such distillery aids and abets in carrying on its unlawful business, and thus becomes, under the provisions of the statute, liable to be prosecuted and punished as a principal."

The Court further stated:

> "Where *intent* is the gist of an offense, it does not follow that acts, which may not be regarded as aiding or abetting such requisite intent, may not be such as would constitute aiding and abetting, where the act, and not the intent with which it was done, constitutes the offense."

Necessarily, in every case involving Section 3281 Revised Statutes, anyone who aids and abets in the carrying on of a business of a distillery on which no bond has been given is guilty as a principal according to the law as defined in Title 18 U. S. C. A., Section

550, particularly as "no one with knowledge of its existence could be connected with its operation, without knowing that the person or persons carrying on its business were operating without bond, and otherwise unlawfully." *Vukich vs. U. S.,* 28 Fed. (2d), at 669.

The cases of *Partson vs. U. S.,* 28 Fed. (2d) 127, and *Seiden vs. U. S.,* 16 Fed. (2d) 197, are distinguished in the *Vukich* case, and have no bearing upon the case now submitted.

The case of *Anderson vs. U. S.,* 30 Fed. (2d) 485, cited by appellants, is not in point, for the reason that intent is an essential element of the offense charged, and therefore an employe of a retail or wholesale liquor dealer cannot be guilty of failing to pay the tax as required by law, under Section 193, Title 26 U. S. C. A.

The case of *Patrilo vs. U. S.,* 7 Fed. (2d) 804, cited by appellants in their brief, page 29, is distinguished from the *Vukich* case in that the *Patrilo* case involved a question as to whether an employe of one engaged in the unlawful manufacturing of intoxicating liquor could be found guilty with the charge of possession of property designed for the unlawful manufacture

of intoxicating liquor in violation of Section 25 of the National Prohibition Act. In other words, the court in the *Patrilo* case held that an employe of owners of property designed for the manufacture of liquor within the meaning of the law could not have possession, custody or control of such property but only the owner could be legally held to be possessed of it.

The other cases cited by appellants to sustain this contention are cases decided long before the enactment of the National Prohibition Act which expressly re-enacted all laws in regard to the manufacture, taxation of and trafficing of intoxicating liquor. Title 27, U. S. C. A., Section 3.

It has always been held that a part owner of a still where he has knowledge of illicit distilling by his co-owner, although he does not share in the product, is equally responsible with the co-owner, as is one who aids and abets such violation.

U. S. vs. Blackwell, Federal Cases No. 14494;
U. S. vs. Carpenter, Federal Cases No. 14727;
U. S. vs. Howard, 26 Federal Cases No. 15401.

The *Vukich* case, decided by this Court, is unanswerable on this contention of appellants.

It is submitted that the motion for directed verdict of acquittal was correctly denied.

Persons joining or participating in the unlawful acts and contributing to the success of the unlawful transaction after the formation of the conspiracy are equally guilty with the originators of the conspiracy.

Baker vs. U. S., 21 Fed. (2d) 903;
U. S. vs. Wilson, 23 Fed. (2d) 113.

A conspiracy may be proven by circumstantial evidence as well as by direct evidence. It is not necessary in order to convict a defendant that it be proved that he was familiar with the entire scope of the conspiracy or acquainted with all of the conspirators. *U. S. vs. Wilson,* 23 Fed.(2d) 113. Likewise, any defendant who contributes to the scheme unlawfully made, by encouraging, aiding, advising or sustaining the same, is equally guilty with the others, and such a person is bound by all of the acts of the co-conspirators. *U. S. vs. Wilson,* 23 Fed. (2d) at page 117. After a defendant participates in the conspiracy, it is immaterial whether or not he committed an overt act.

Babb vs. U. S., 27 Fed. (2d) 80;

Chaplain vs. U. S., 28 Fed. (2d) 567;
Baker vs. U. S., 21 Fed. (2d) 903.

Appellants complain of certain instructions made and requested instructions refused by the Court, but it is seen from the record that exceptions noted go only to assignments 5, 14 and 18 (Tr. 122). This Court should only consider assignments properly preserved in the record on appeal.

As to assignments 1 and 2, appellants complain of an instruction to the effect that if appellants are convicted on one count they must be convicted on all of the counts in the indictment. These instructions must be viewed in the light and circumstances of the case as presented by the evidence. If any conspirator aided and abetted in the conspiracy to violate the National Prohibition Act at the time and place alleged in the indictment, it follows that he also is guilty of aiding and abetting or of the commission of the substantive offenses charged. *Samich vs. U. S.*, 22 Fed. (2d) 672.

Appellants complain that the instructions of the Court were an attempt on its part to usurp the functions of the jury. In the face of the rule that Fed-

eral judges may comment upon the evidence the entire charge of the trial court in this case fairly instructed the jury and could not have misled them.

Particular instructions must be taken into consideration, together with the entire charge. *Wallenstein vs. U. S.,* 25 Fed. (2d) 708; *Bonus vs. U. S.,* 20 Fed. (2d) 754.

In assignment of error No. 5 appellants complain of an instruction to the trial court based on the maxim "*falsus in uno, falsus in omnibus.*" All of the cases cited by appellants on this point go to sustain the instructions given rather than to prove error. Both the instructions excepted to and the amplified instruction given after the exception was taken (Tr. 122) must be considered as falling within the well established rule that credibility of the witnesses is entirely for the jury. The Court merely stated if a witness falsely testified "in any one particular" that it was their duty to mistrust all the balance of his testimony, "and that they may refute it all as unworthy of credit," the word "may" being a word of permissive rather than mandatory quality. All of the cases cited by appellants on this point approve the use of the word "may" as opposed to the use of the

directory word "shall." 28 *R. C. L.* 659. *Butler vs. State,* 77 Southern Rep. 72. Nothing in the instructions complained of indicated to the jury that they were bound to mistrust the testimony of a witness who had testified falsely in any particular.

It is complained of the instruction by the Court on the law of conspiracy (Tr. 108, 109, 110). The assignment complains of only a part of the instruction given by the Court on this question. When the entire instruction on the question of conspiracy is examined (Tr. 108, 109, 110) it is obvious that appellants cannot effectively complain of the same. The whole of the charge on this point fairly instructs the jury as to the law, and is in no wise misleading.

The appellant's asignments 3 and 4 as to the instructions of the Court defining reasonable doubt are without merit having been sustained by decisions of this Court heretofore.

Kearns vs. United States, 27 Fed. (2d) 854.

Assignment 10 is sustained by the evidence (Tr. 98).

As to assignments 9 and 11, the Court instructed the jury fully to the effect that a defendant who joins

the conspiracy late is just as guilty as a defendant who comes in at its inception. The instructions are sustained in law.

Baker vs. U. S., 21 Fed. (2d) 903;
U. S. vs. Wilson, 23 Fed. (2d) 113.

At this point (see page 31 appellant's brief) counsel argue that the facts are as consistent with the innocence as with the guilt of appellants. However, the appellants Cvitkovic, Jandrilovich and Boskoyceh went to the still, it must be remembered, in response to a telephone call, which indicated both guilty knowledge on their part and also that the destruction of the still and the termination of the conspiracy was not in their minds, but, on the contrary, it was their intent to preserve the means of the unlawful operations, i. e., the still and accessories thereto (Tr. 36-37).

As to assignment 12, obviously the Court has power, and should exercise it, to correct a clerical error in the verdict. No prejudice resulted to appellants from such correction.

Meyers vs. U. S., 3 Fed. (2d) 379;
Levin vs. U. S., 5 Fed. (2d) 603.

In assignments 13 and 14 appellants maintain that only a principal with proprietary interest in the still

could be guilty of Count II. This is refuted in the case of *Vukich vs. U. S.,* 28 Fed. (2d) 666, hereinabove referred to at length.

Furthermore, no exception was taken to the refusal of the Court to give requested instructions of appellants. (See Tr. 122.)

There is no merit to assignment 15. *Stack vs. U. S.,* 27 Fed. (2d) 16 and 17.

Assignments 16, 17 and 18, complain of a refusal to give instructions. The Court fully instructed the jury on this point (Tr. 118-119).

By assignment 21 appellant Jandrilovich complains of the rejection of testimony by the Court. It is clearly indicated by the testimony as set forth in the transcript (pages 137-139) that no prejudice resulted to the appellant from the rejection of this evidence, it being wholly immaterial.

Assignment 22 complains of the refusal of the Court to grant a new trial. This matter is purely discretionary with the Court under elemental rules of law.

In assignment 23 appellants complain error as to

imposition of judgment and sentence against appellants.

A combined sentence, not exceeding that which could be imposed on one count alone, must be sustained, if either Count supports it.

> *U. S. vs. Trenton Company,* 273 U. S. 392;
> *Koth vs. U. S.,* 16 Fed. (2d) 59;
> *Dickerson vs. U. S.,* 20 Fed. (2d) 901.

Appellants, in concluding their brief, cite at length from the case of *Di Bonaventura vs. U. S.,* 15 Fed. (2d) 494, to the effect that a landlord must not only have knowledge, but after sufficiently complete notice or knowledge, a reasonable time must have elapsed for him to reach his tenant and insist upon either vacation of the premises or an absolute cessation of the illicit business. The instructions hereinabove referred to as given by the trial judge in this case fully answer this contention of appellants. The law as laid down in the *Di Bonaventura* case is not applicable to the facts as presented by this case.

The trial Court committed no error in failing to give the instructions requested, as the instructions given fully presented the theory of the defense to the jury. It is respectfully submitted that on the

basis of the evidence shown by the record, and the authorities herein cited, together with other logical and persuasive authority, the case should be affirmed.

ANTHONY SAVAGE,
United States Attorney,

CAMERON SHERWOOD,
Assistant United States Attorney,

HAMLET P. DODD,
Assistant United States Attorney

Attorneys for Appellee.